IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3819 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

AHMEDABAD MUNI. TRANSPORT SERVICE

Versus

DHULABHAI SHANKERBHAI PAREKH

Appearance:

1. Special Civil Application No. 3819 of 1991

MR MG NAGARKAR for Petitioner No. 1

MR PS PATEL for Respondent No. 1

CORAM : MR.JUSTICE JAYANT PATEL

Date of decision: 27/02/2002

ORAL JUDGEMENT

The present petition is filed by the employer against the judgment and award dated 13th July, 1990 passed by the Labour Court at Ahmedabad in Ref.(LCA)

No.22/83 whereby the respondent workman is ordered to be reinstated in service with 40% backwages. This petition was initially admitted and the stay was granted by this court on 12.6.91 staying the operation of the award as regards backwages. The learned counsel for parties have informed this court that in view of the fact that stay not being granted against the reinstatement, the workman, pending the petition, has been reinstated in service and is working as today.

2. Short facts of the case are that the petitioner-employer is running transport operations in the city of Ahmedabad and the respondent is working as bus conductor with the petitioner. It is the case of the petitioner that the respondent workman had not issued ticket of Rs.3.85ps to the passenger and on the said count ultimately chargesheet was issued to the workman and an opportunity was given to the respondent workman to defend the case. However, the same was not availed of by the respondent workman and the inquiry officer had concluded that the charges are proved. The Disciplinary Authority thereafter has issued show cause notice as to why the respondent workman should not be dismissed from service. The explanation given by the respondent workman was not satisfactory and therefore ultimately the decision was taken by the Transport Manager who is the competent authority of the petitioner to dismiss the respondent workman from service. The respondent workman thereafter raised a dispute under the Industrial Disputes Act (hereinafter referred to as "the Act") which ultimately came to be referred to the Labour Court for adjudication in Ref(LCA) No.22/83. Before the labour court the respondent workman did not challenge the holding of departmental inquiry but contended that the findings are not accepted and that the punishment is disproportionate to the charges. The labour court examined the matter and found that the passengers are not examined during the course of inquiry and that the statements of certain passengers were not given together with the chargesheet. It was found by the labour court that it has not come on record that the amount of Rs.3.85ps was collected and that the respondent workman had not issued ticket to concerned passenger and it was further found by the labour court that it is the first incident and therefore ultimately the labour court found that the workman deserves to be reinstated in service and as regards backwages is concerned the petitioner was ordered to pay 40% of backwages. It is this award of the labour court which is under challenge before this court.

3. I have heard Mr.Nagarkar learned advocate appearing for the petitioner and Mr.P.S.Patel learned advocate appearing for the respondent workman.

4. It was contended by Mr.Nagarkar that it is a case of misappropriation and therefore as per the settled legal position that even a single incident of misappropriation would call for penalty of dismissal. In furtherance of his contention Mr.Nagarkar submitted that in any event the labour court ought not to have directed for payment of 40% backwages, more particularly, when the corporation was not at fault and if the award of the labour court is allowed to operate qua backwages it results into awarding premium to the wrong doer and therefore the award of the labour court in any case deserves to be quashed to the extent of awarding 40% backwages.

5. On the other hand, Mr.Patel, learned advocate appearing for the respondent workman contended that this court has limited scope of scrutiny under Article 227 of the Constitution, and when the labour court upon examining the evidence available with it found that the imposition of punishment of dismissal is too harsh and when the labour court has only awarded 40% backwages there is no reason for interference of this court in exercise of its powers under Article 227 of the Constitution and therefore he submitted that this court should dismiss this petition.

6. Having considered the rival contentions of the parties and on perusal; of the award of the labour court it transpires that the workman has not participated during the course of departmental inquiry and therefore the workman can not take the contention that certain documents were not supplied including that of statements of passengers together with the chargesheet. The labour court while considering the aspect of inquiry has found that the passenger has not been examined but I am of the view that when the workman has not participated in the inquiry in support of his defence, he can not subsequently contend that certain examination of witnesses were not made and he is not entitled to any benefit. So far as observation of principles of natural justice is concerned, it is well settled legal position that if an opportunity has been given and inspite of the same the opportunity is not availed of by the person concerned he can not complain now that the opportunity or proper opportunity was not given and therefore the departmental inquiry is vitiated on that ground, but at the same, upon perusal of evidence and inquiry the labour

court has factually found that it has come on record that the ticket for Rs.3.85ps was not issued and thereafter it has not come on record by positive evidence that the amount was collected by the workman from the passenger and the ticket was not issued after collecting the amount. Further, the labour court has found that it is the first incident in the service of the workman. It is clarified before this court the petitioner has not produced any material to show that the incident in question is not the first incident but only a bald averment is made without producing any material nor it is contended by the petitioner that any such material was produced by the petitioner before the labour court and the same is not considered. It is well settled that this court can not permit the parties to raise any additional contention or produce any material once that material was not produced before the labour court while exercising powers under Article 226/227 of the Constitution.

7. As regards exercise of power under section 11A of the Act is concerned different circumstances and yardsticks have been laid down by this court in the judgment, dated 19.2.2002 in the matter of Banco Products (India) ltd vs Pravinchandra Bhogilal Patel (Special Civil Application No. 814001) and therefore it is not to be discussed again. Considering the said yardsticks and over all facts and circumstances of the case, I am of the view that the labour court at most could have ordered for reinstatement but awarding of 40% backwages would result into awarding premium to the wrong doer, more particularly, when during the course of inquiry it was found that the charges are proved. Therefore, the judgment and award of the labour court so far as awarding 40% backwages to the workman is concerned deserves to be quashed.

8. Under the above facts and circumstances, the judgment and award of the labour which is under challenge in this petition stands substituted by reinstatement only and with further clarification that the workman shall not be entitled to any backwages from the date of dismissal till reinstatement in service. Petition, accordingly, stands allowed to the aforesaid extent only. Rule is made absolute to the aforesaid extent only. There shall be no order as to costs.

27.2.2002 (JAYANT PATEL,J)